IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, MISSOURI PACIFIC RAILROAD COMPANY, AND SOUTHERN PACIFIC TRANSPORTATION COMPANY,

Petitioners,

v.

STATE OF TEXAS

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Can the Interstate Commerce Commission, under 49 U.S.C. 10505 and 49 U.S.C. 11501, exempt from regulation the motor truck portion of intrastate trailer-on-flatcar and container-on-flatcar service performed by a rail carrier as a federal standard based on exemption of interstate TOFC/COFC service performed by rail carriers without infringing on State motor carrier intrastate regulation?

LIST OF PARTIES

State of Texas was petitioner in the case below in the Fifth Circuit Court of Appeals.

United States of America and Interstate Commerce Commission were respondents.

Missouri-Kansas-Texas Railroad Company, Missouri Pacific Railroad Company and Southern Pacific Transportation Company were intervenors in support of United States of America and Interstate Commerce Commission.

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Missouri-Kansas-Texas Railroad Company, Missouri Pacific Railroad Company and Southern Pacific Transportation Company ("Railroads") petition for a writ of certiorari to review an opinion and judgment of the United States Court of Appeals for the Fifth Circuit entered September 6, 1985. The court of appeals' judgment vacated a decision of the Interstate Commerce Commission ("Commission") in Docket No. 39627.

I.

OPINION BELOW

The decision of the Court of Appeals for the Fifth Circuit is reported at 770 F.2d 452 (1985), and a copy is contained in the Appendix to the Petition for Writ of Certiorari filed in this proceeding by the Interstate Commerce Commission. Herein-

after, all citations will be to that appendix. The Commission's decision is dated January 19, 1984, and may be found in the Appendix at page 16a.

II.

JURISDICTION

The judgment below was entered on September 6, 1985. The court of appeals, on November 15, 1985, entered an order denying petitions for rehearing and for suggestions for rehearing *en banc*. A copy of the order is in the Appendix at page 12a. Jurisdiction is provided by 28 U.S.C. Sec. 1254(1).

III.

STATUTES INVOLVED

The statutes involved in this proceeding are 49 U.S.C. 11501 and 49 U.S.C. 10505. Verbatim copies of the statutes may be found in the Appendix at pages 30a and 37a as respectively.

IV.

STATEMENT OF THE CASE

The issue to be decided in this case is whether the State of Texas, which has no authority to regulate intrastate transportation provided by a rail carrier,[1] may nevertheless assert jurisdiction over some intrastate transportation provided by a rail carrier. If the decision below stands, the State of Texas

[1] The RCT lost its authority to regulate intrastate rail rates, classification, rules and practices when it was denied certification by the Commission in Ex Parte No. 388 (Sub-No. 31), *State Intrastate Rail Rate Authority — Texas*, served April 20 1984, 1 ICC 2d 26 (1984), *aff'd* in *Railroad Commission of Texas v. United States*, 765 F.2d 221 (D.C. Cir 1985) (*RCT*).

will have been able to reassert jurisdiction over intrastate transportation provided by a rail carrier simply by asserting a different definition of transportation.

In *Improvement of TOFC/COFC Regulation*, 364 I.C.C. 731 (1981), *aff'd.* in *American Trucking Ass'ns v. Interstate Commerce Commission*, 656 F.2d 1115 (5th Cir 1981) (*ATA*), the Commission, under 49 U.S.C. 10505, exempted from regulation the movement of trailer-on-flatcar (TOFC) and container-on-flatcar (COFC) rail traffic. This exemption includes both rail and truck transportation provided by a rail carrier as part of a continuous intermodal move.

Railroads, on September 27, 1982, requested the Railroad Commission of Texas ("RCT") to apply the exemption to Texas intrastate rail TOFC/COFC traffic to the same extent the exemption applied to interstate rail TOFC/COFC traffic.[2] In response, the RCT granted a partial exemption covering the rail but not the truck portion of the intrastate TOFC/COFC transportation provided by a rail carrier. The Railroads then petitioned the Commission under 49 U.S.C. 11501(c) to review the RCT's decision and to grant the full TOFC/COFC exemption. The Commission, in Docket No. 39627, *Petition Under 49 U.S.C. 11501(c) by Missouri-Kansas-Texas Railroad Company, et al, For Review of an Order of the Railroad Commission of Texas*, served January 23, 1984, not printed, granted Railroads' petition and made the interstate exemption fully applicable to Texas intrastate TOFC/COFC transportation provided by a rail carrier. (See Appendix, page 16a.)

The State of Texas appealed and the Fifth Circuit Court of Appeals rendered the judgment below on September 6, 1985, holding that the Commission did not have the authority to

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[2] At that time the RCT had been provisionally certified to regulate intrastate rail transportation. *State Intrastate Rail Rate Authority — P.L. 96-448*, 364 I.C.C. 881 (1981).

apply the full TOFC/COFC exemption to Texas intrastate transportation provided by a rail carrier. Instead, the Court of Appeals agreed with the RCT that truck service provided by a rail carrier as a part of a continuous intrastate intermodal move was motor carrier service still subject to state regulation. *State of Texas v. United States*, 770 F.2d 452 (5th Cir 1985) (*Texas*). (See Appendix, p. A-1.) The petitions for rehearing and suggestions for rehearing *en banc* were denied on November 15, 1985. (See Appendix, page 12a)

V.

REASONS FOR GRANTING THE WRIT

A. THE COURT OF APPEALS' DECISION IS AT ODDS WITH AND IS IRRECONCILABLE WITH THE DECISION OF THE DISTRICT OF COLUMBIA CIRCUIT COURT OF APPEALS DECISION IN *ILLINOIS COMMERCE COMMISSION v. ICC.*

The decision below conflicts irreconcilably with the decision in *Illinois Commerce Commission v. I.C.C.*, 749 F.2d 875 (D.C. Cir 1984) (*Illinois*), and creates special and important reasons for the Court to review on a writ of certiorari. In *Illinois* the court of appeals affirmed a Commission decision that when an exemption on interstate rail transportation was granted under 49 U.S.C. 10505 by the Commission, that exemption automatically applied with equal application to intrastate rail transportation. The court of appeals found that

> "[i]n view of the overriding importance of the exemption provisions, it was reasonable for the ICC to conclude that the statute required States to give immediate and automatic effect to federal exemptions." *Illinois, supra.*, p. 884.

In fact, the Commission decision which was reviewed in *Illinois* specifically considered the TOFC/COFC exemption in reaching the decision. In *State Intrastate Rail Rate Author-*

ity — P.L. 96-448, 367 I.C.C. 149, 153 (1983) (*State*), the decision reviewed in *Illinois*, the Commission found that

> "[b]ecause section 10505, and its underlying policy, is such a significant aspect of the Staggers Act, Congress could not have intended the practical problems and inconsistencies that would result from States retaining jurisdiction over classes of traffic exempted nationwide by the Commission."

The Commission's rationale, upheld in *Illinois*, was that different treatment of interstate and intrastate TOFC/COFC traffic "would cause unjustifiable operational and/or marketing difficulties for the railroads conducting business for the same class of traffic under both a regulated and unregulated environment." *State*, *supra*, p. 153. The decision below squarely conflicts with the holding of *Illinois* because it allows a different treatment for interstate and intrastate TOFC/COFC traffic.

The decision below is irreconcilable with the *Illinois* case because the decision allows the RCT to define what is covered by the exemption differently than the way the exemption is defined by the Commission. Specifically, the TOFC/COFC exemption adopted by the Commission and upheld by the same court of appeals below in *ATA*, *supra*, found that rail-owned truck TOFC/COFC service was transportation provided by a rail carrier. Under the rationale of *Illinois*, the RCT was obliged to adopt this same exemption as defined by the Commission. The decision below, however, allowed the RCT to adopt the exemption implicitly employing a definition that the truck portion of a continuous intermodal move was not transportation provided by a rail carrier.

The result is a basic conflict between the Fifth Circuit and the District of Columbia Circuit over whether the Commission or the States have final say over the regulation of intrastate rail transportation. While the decision below does concede that the Commission does have jurisdiction over intrastate rail

traffic (See *Texas, supra*, at p. 454), the court of appeals below allows the RCT to reassert jurisdiction over intrastate rail traffic by saying that the truck portion of a continuous intermodal move provided by a rail carrier is actually motor carrier service. If the RCT is able to reassert jurisdiction over intrastate rail transportation in this fashion, then the Congressional preemption of intrastate rail regulation will be undercut. See *Illinois, supra*, at p. 878. The District of Columbia Circuit holds that the Commission determines the exemptions applicable to intrastate rail transportation, while the Fifth Circuit holds that the State determines. Railroads believe this Court must determine the question and should agree with the District of Columbia Circuit.

B. THE COURT OF APPEALS BELOW WRONGLY DECIDES AN IMPORTANT FEDERAL QUESTION WHICH SHOULD BE SETTLED BY THIS COURT.

The situation is all the more anomalous since the RCT now has absolutely *no* authority to regulate intrastate rail transportation. The RCT lost its authority because of its persistent refusal to follow the Federal standards and procedures as required by 49 U.S.C. 11501. See *RCT, supra*, at p. 224-226. The denial of certification by the Commission meant that the RCT has no jurisdiction at all over intrastate rail transportation as required by 49 U.S.C. 11501(b)(4)(B) which provides that

> "[a]ny intrastate transportation provided by a rail carrier in a State which may not exercise jurisdiction over an intrastate rate, classification, rule or practice of that carrier due to a denial of certification under this subsection shall be deemed to be transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title."

There is no question but that the transportation in question — truck service provided by a *rail carrier* as part of a

continuous intermodal move — is intrastate transportation provided by a rail carrier under 11501(b)(4)(B). That the transportation in question is transportation by rail carrier is even acknowledged by the Fifth Circuit. See *ATA*, *supra*, at p. 1120. Therefore, it is the Commission, and not the RCT, which has jurisdiction over truck service provided by a rail carrier as part of a continuous intermodal move. The decision below is simply wrong. The RCT has no jurisdiction at all over any intrastate rail transportation unless and until certified by the Commission.

Finally, the result of the decision below will be to discriminate unfairly against intrastate TOFC/COFC shippers. If a TOFC/COFC shipment is interstate and involves truck service provided by a rail carrier as part of a continuous intermodal move, then the shipment is exempt from regulation. That shipper will have the benefit and flexibility of deregulated transportation. On the other hand, an intrastate shipper's TOFC/COFC truck service provided by a rail carrier as part of continuous intermodal move would be faced with the less flexible regulated environment. This is precisely the sort of state economic control over units of the national railroad system that the Staggers Rail Act of 1980[3] was designed to end.

In addition, the Railroads will suffer harm as a result of the double standard. Both interstate and intrastate TOFC/COFC shipments move in the same trailers in the same trains. Yet, if the decision below is upheld, the Railroads will be forced to provide different and more expensive handling to the intrastate shipment than to the interstate shipment, contrary to the intent of Congress in passing Section 11501. The following example is illustrative.

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[3] Pub. L. No. 96-448, 94 Stat. 1895.

Suppose one shipper wants to make a TOFC shipment from Houston to Texarkana, Texas, and another shipper a shipment to Texarkana, Arkansas. Further suppose the rail carrier the first shipper chose will move the shipment from Houston by rail to Dallas and then via its own truck to Texarkana, Arkansas. That move would be subject to the exemption and would be deregulated. The other shipper wanting to use the same rail service to Texarkana, Texas, would face quite a different situation. The rail carrier could move the shipment to Dallas, but in order to move the shipment in its own truck serivce to Texarkana, Texas, would first have to obtain a certificate from the RCT to operate between Dallas and Texarkana, would have to publish tarrifs, and would have to operate as a regulated motor carrier. Neither the RCT nor the decision below provides any explanation of why such disparate treatment is needed or required. Railroads submit there can be no justification for such discrimination against intrastate shippers. The standards should be the same for both interstate and intrastate shippers and rail carriers. This Court should so rule.

The example discussed above is similar to the example discussed by the Commission in *State*, the decision upheld in *Illinois*. After discussing an interstate TOFC move from Chicago, Illinois, to St. Louis, Missouri, and an intrastate TOFC move from Chicago to East St. Louis, Illinois, the Commission concluded

> "that Congress did not intend for the continued existence of State regulation that would produce this awkward result — namely, interference with the railroads' and shippers' freedom to take advantage of permitted flexibility in doing business under the Staggers Act." *State*, *supra*, p. 153.

Against this reasoning upheld by *Illinois*, the court of appeals below weakly held that

> "to accept uncritically the I.C.C.'s argument that it can exempt intrastate trucking connected with intrastate rail travel from all regulation would be to court potential mischief." *Texas, supra*, p. 454.

The court then discusses the example of a potential small Texas intrastate railroad move of TOFC shipments only a small distance by rail and then a long distance by rail-owned truck. This example of a sham transaction is purely the result of hypothesis and conjecture by the Court and cannot be found in the record. However, the court does not say why this is a potential mischief and, most importantly, does not balance this unsubstantiated "mischief" against the real problem faced by Texas railroads if they must handle interstate TOFC as deregulated and intrastate TOFC as regulated. It should also be kept in mind that the small intrastate railroad that so worried the court below (if there is such a railroad) would not be subject to Commission regulation if it did not connect with any interstate railroads. *Magner — O'Hara Scenic Ry. v. I.C.C.*, 692 F.2d 441 (6th Cir 1982). Additionally, the Interstate Commerce Act cannot be invoked to frustrate state authority where the basis for invoking the Federal authority is, as in the Court's hypothetical, a sham. *Hudson Transportation Co. v. U.S.*, 219 F. Supp 43 (D.C.N.S. 1963), *aff'd sub nom. Arrow Carrier Corp. v. U.S.*, 375 U.S. 452 (1964).

VI.

CONCLUSION

For the reasons set forth above, the Railroads respectfully request this Court to grant this petition for a writ of certiorari.

Respectfully submitted,

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